

The Basic Presentation as of August, 2015

Mini-Brooks
Qualifications Based Selection
(including abbreviated
Design/Build provisions)
(see the Supplement Presentation for full
Design/Build Statutes and analysis)

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Where we're going!

- History of Qualifications Based Selection
- NC Statute – GS 143-64.31 et seq.
 - Law and Exemptions
 - With the 2014 Legislative Changes
- NC Administrative Code (Board Rules)
- Board Newsletter Q&A + AG Opinion

Where we're going!

- Construction Manager at Risk
- 2013 Legislative Changes
 - HB 857 – SL 2013-401 Sec. 1
 - Design-Build Services & Public-Private Partnership Construction Services
 - Design-Build Bridging Contracts
- 2014 Legislative Changes HB 1043 SL 2014 Sec. 3,4
 - Added 143-64.31(f)
- G.S. 128.1 A, B & C
 - 1A. Design-build contracts
 - 1B. Design-build bridging contracts
 - 1C. Public-private partnerships
- Application of Mini-Brooks to Design/Build

Where we're going!

- How Engineering/Land Surveying Firms may respond
- Scenarios
- Questions

The Man Behind the **Law**



QBS

Federal Brooks Act

40 U.S. Code 1101 et seq.
(formerly 541)

Introduced by **Congressman Jack Brooks** of Texas in 1972 to codify selection of architects and engineers (and surveyors) based on qualifications rather than solely on lowest price.

President Nixon signed into law on October 27, 1972.

Applies to Federal Government projects.

Mini-Brooks Acts

- Forty-seven states have implemented “Mini-Brooks” Acts for QBS.
- Numerous local governments have also adopted laws modeled after the federal statute.
- Moreover, QBS is endorsed by the American Bar Association in its Model Procurement Code for State and Local Government.

North Carolina “Mini-Brooks” G.S. 143-64.31 et seq.

Became law in 1987 for the procurement of architectural, engineering and land surveying services based on qualifications. Construction management at risk services added in 2001. Design-build services, and public-private partnership construction services were added in 2013.

Applies to the State and its public subdivisions and Local Governmental Units.

Relating Regulations to Procuring Professional Services

- **What** are the laws, rules, opinions and interpretations that apply?
- **When** is it architectural, engineering, land surveying or construction management at risk services?
- **Where** can you seek advice?
- **How** can you assure that you comply?
- **How** do you handle Design/Build?

Qualifications Based Selection Law, Rules and Opinions

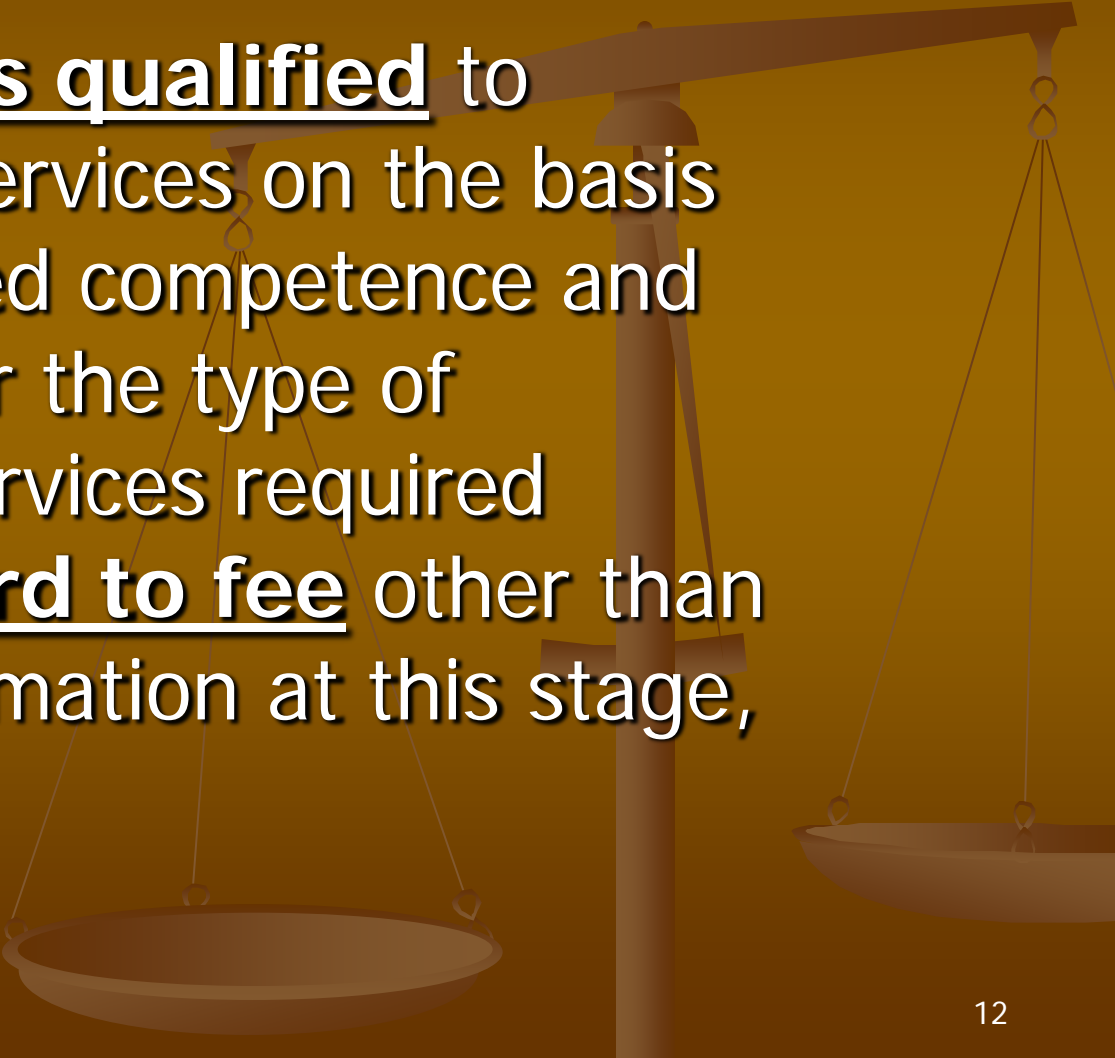
- Federal Brooks Act U.S. Code 541 et seq.
- State Statute G.S. 143-64.31 et seq.
- Engineers and Land Surveyors Board Rule NCAC 21-56.0701(f)(3)
- Architects Board Rule NCAC 21-02.0209(9)
- Eng/LS Board Newsletter Spring 2001 Q&A
- Attorney General Opinion June 19, 2001

NCGS 143-64.31

(a) It is the public policy of this State and all public subdivisions and Local Governmental Units thereof, except in cases of special emergency involving the health and safety of the people or their property, to announce all requirements for architectural, engineering, surveying, construction management at risk services, [design-build services, and public-private partnership construction services]

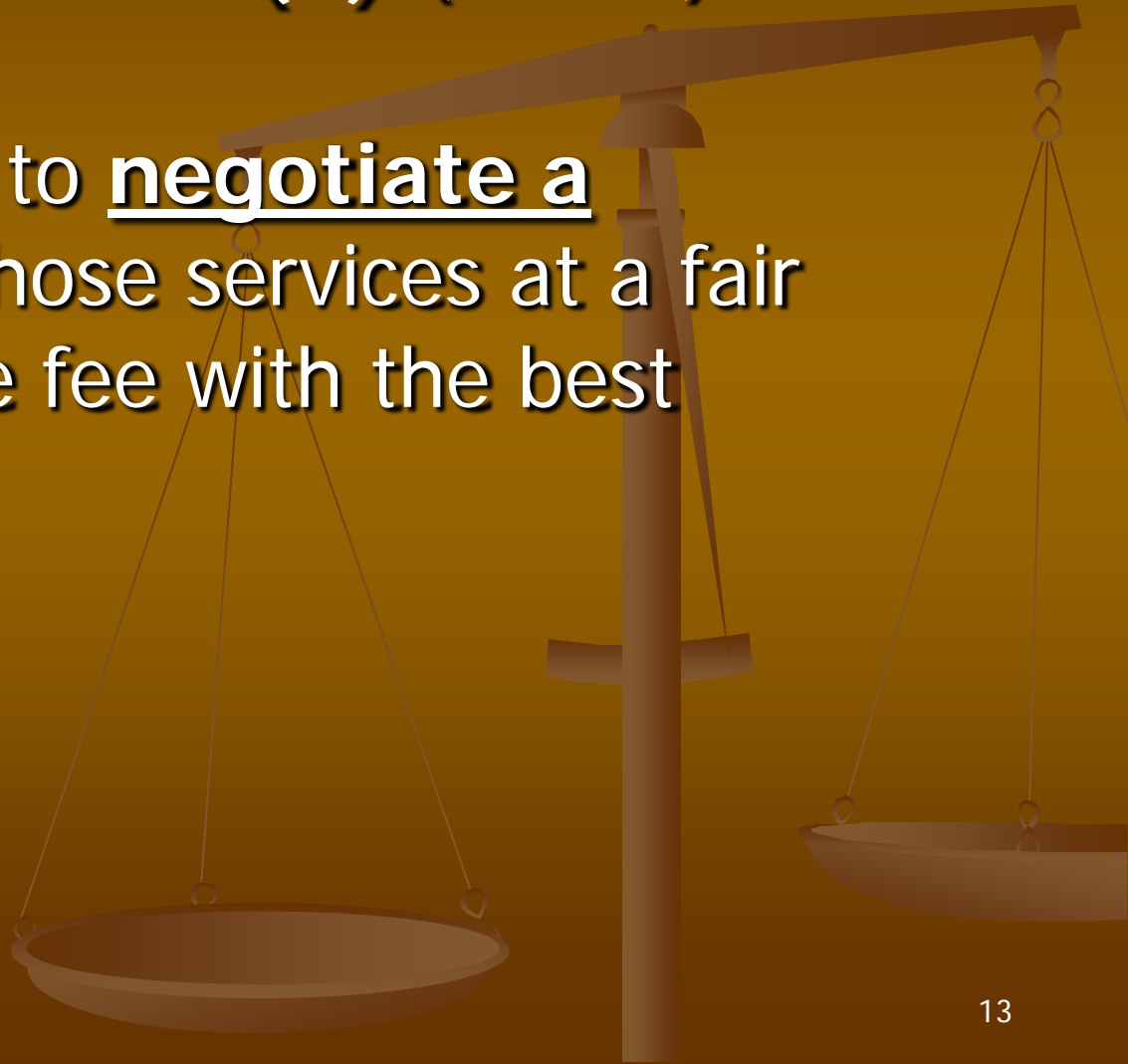
NCGS 143-64.31(a) (cont'd)

to select firms qualified to provide such services on the basis of demonstrated competence and qualification for the type of professional services required without regard to fee other than unit price information at this stage,



NCGS 143-64.31(a) (cont'd)

and thereafter to negotiate a contract for those services at a fair and reasonable fee with the best qualified firm.



NCGS 143-64.31(a) (cont'd)

If a contract cannot be negotiated with the best qualified firm, negotiations with that firm shall be terminated and initiated with the next best qualified firm.

QBS

NCGS 143-64.31(a) (cont'd)

Selection of a firm under this Article shall include the use of good faith efforts by the public entity to notify minority firms of the opportunity to submit qualifications for consideration by the public entity.

NCGS 143-64.31

(a1) A resident firm providing architectural, engineering, surveying, construction management at risk services, [design-build services, and public-private partnership construction services] shall be granted a preference over a nonresident firm, in the same manner, on the same basis, and to the extent that a preference is granted in awarding contracts for these services by the other state to its resident firms over firms resident in the State of North Carolina. For purposes of this section, a resident firm is a firm that has paid unemployment taxes or income taxes in North Carolina and whose principal place of business is located in this State.

NCGS 143-64.31 (cont'd)

[(b) Recodified as G.S. 143-133.1(a) by Session Laws 2014-42, s. 3, effective October 1, 2014, and applicable to contracts awarded on or after that date.

(c) Recodified as G.S. 143-133.1(b) by Session Laws 2014-42, s. 3, effective October 1, 2014, and applicable to contracts awarded on or after that date.

(d) Recodified as G.S. 143-133.1(c) by Session Laws 2014-42, s. 3, effective October 1, 2014, and applicable to contracts awarded on or after that date.

(e) For purposes of this Article, the definition in G.S. 143-128.1B and G.S. 143-128.1C shall apply.]

NCGS 143-64.31

Added (f) in 2014

[(f) Except as provided in this subsection, no work product or design may be solicited, submitted, or considered as part of the selection process under this Article; and no costs or fees, other than unit price information, may be solicited, submitted, or considered as part of the selection process under this Article. Examples of prior completed work may be solicited, submitted, and considered when determining demonstrated competence and qualification of professional services; and discussion of concepts or approaches to the project, including impact on project schedules, is encouraged.] (1987, c. 102, s. 1; 1989, c. 230, s. 2; 2001-496, s. 1; 2006-210, s. 1; 2013-401, s. 1; **2014-42, ss. 3, 4.**)

NCGS 143-133.1

a) Public entities that contract with a construction manager at risk, [design-builder, or private developer under a public-private partnership] shall report to the Secretary of Administration the following information on all projects where a construction manager at risk, [design-builder, or private developer under a public-private partnership] is utilized:

- (1) A detailed explanation of the reason why the particular construction manager at risk, [design-builder, or private developer] was selected.
- (2) The terms of the contract with the construction manager at risk, [design-builder, or private developer] .

NCGS 143-64.32

Written exemption of particular contracts.

Units of local government or the North Carolina Department of Transportation may in writing exempt particular projects from the provisions of this Article in the case of:

(a)— Proposed projects where an estimated professional fee is in an amount less than ~~thirty~~ fifty thousand dollars (~~\$30,000~~50,000), or

NCGS 143-64.32 (cont'd)

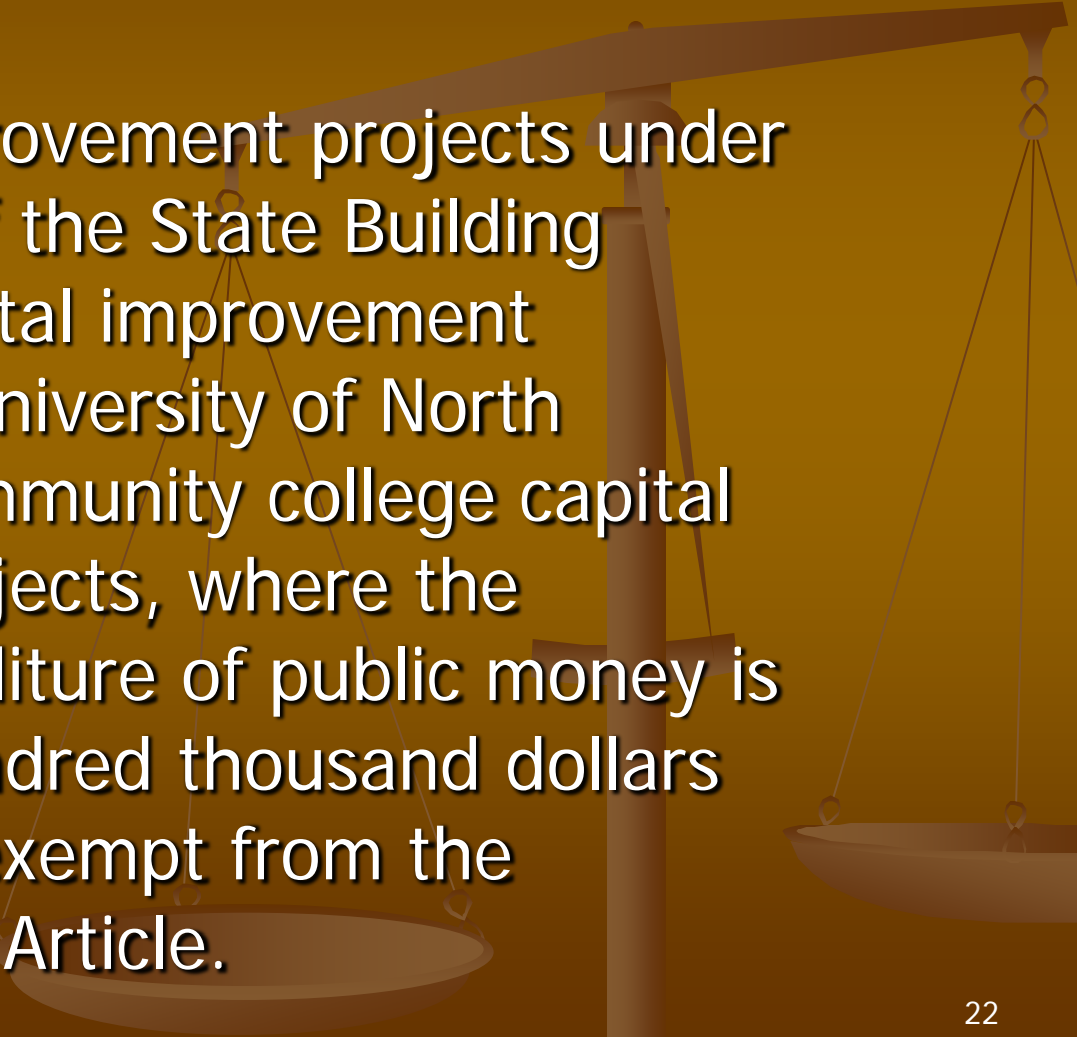
~~(b) — Other particular projects exempted in the sole discretion of the Department of Transportation or the unit of local government, stating the reasons therefore and the circumstances attendant thereto.~~

[Revisions effective August 23, 2013, from Session Law 2013, Chapter 401, Section 2 (House Bill 857-Ratified)]

NCGS 143-64.34

Exemption of certain projects.

State capital improvement projects under the jurisdiction of the State Building Commission, capital improvement projects of The University of North Carolina, and community college capital improvement projects, where the estimated expenditure of public money is less than five hundred thousand dollars (\$500,000), are exempt from the provisions of this Article.

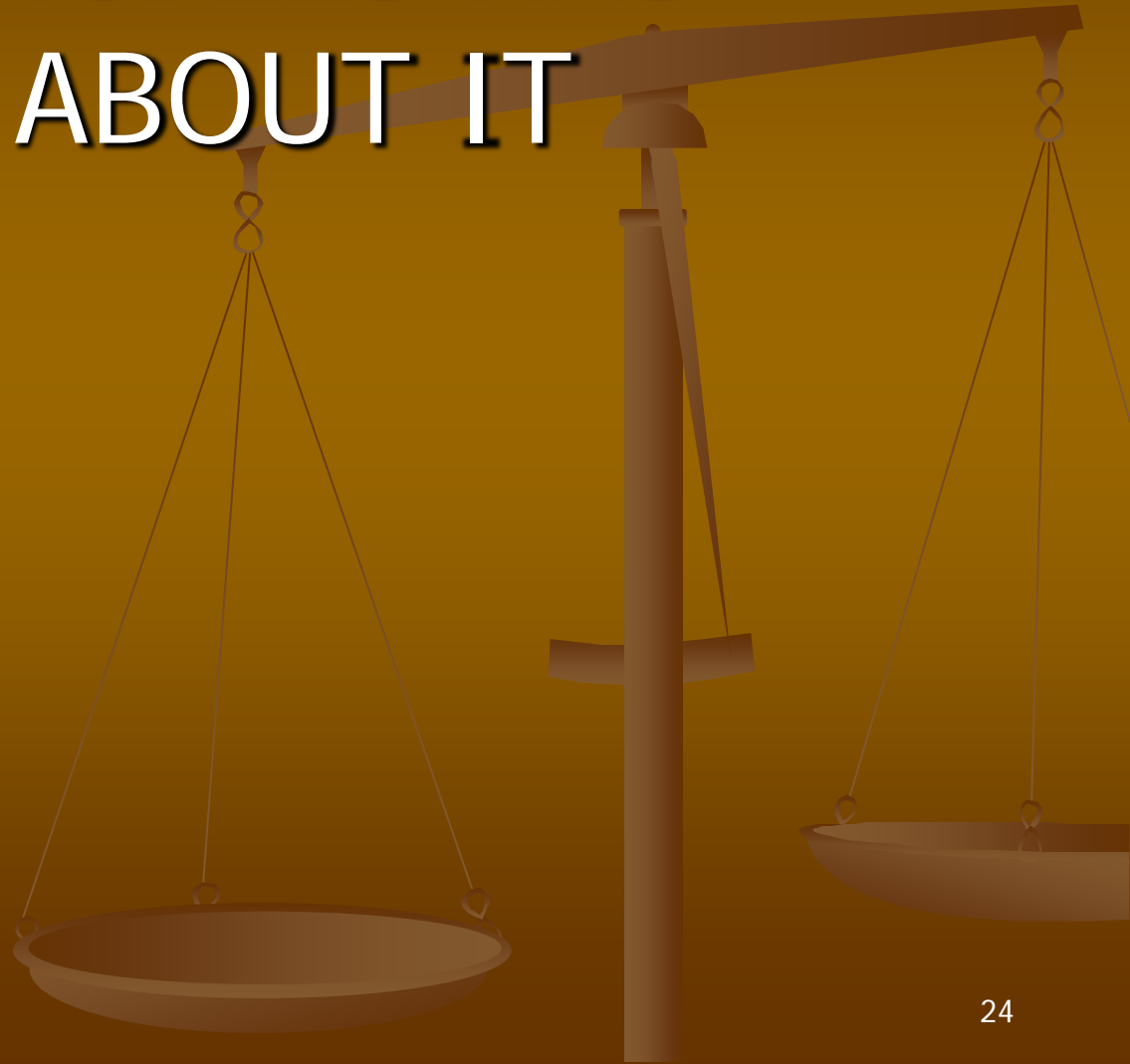


DOT NCGS 136-28.1

DOT Letting of contracts to bidders after advertisement.

(f) Notwithstanding any other provision of law, the Department of Transportation may solicit proposals under rules and regulations adopted by the Department of Transportation for all **contracts for professional engineering services and other kinds of professional or specialized services necessary in connection with the planning, design, maintenance, repair, and construction of transportation infrastructure**. In order to promote engineering and design quality and ensure maximum competition by professional firms of all sizes, the Department may establish fiscal guidelines and limitations necessary to promote cost-efficiencies in overhead, salary, and expense reimbursement rates. The right to reject any and all proposals is reserved to the Board of Transportation.

WHAT NCBEES HAS SAID ABOUT IT



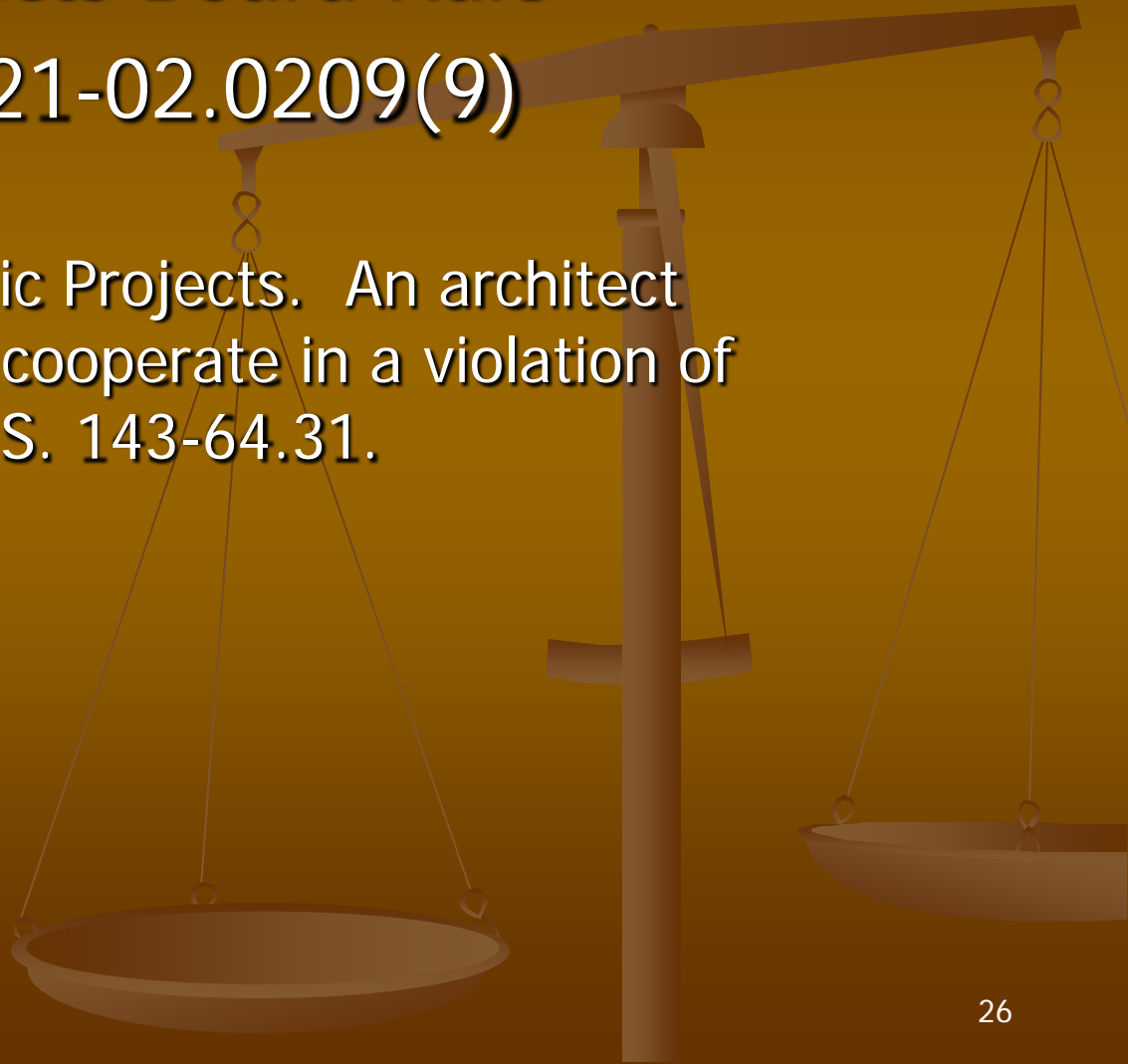
Engineers and Land Surveyors Board Rule

NCAC 21-56.0701(f)(3)

Shall, with regard to fee bidding on public projects, comply with the provisions of G.S. 143-64.31 et seq., (or for federal projects, the Brooks Act, 40 U.S. Code 541 et seq.) and shall not knowingly cooperate in a violation of any provision of G.S. 143-64.31 et seq. (or of 40 U.S. Code 541 et seq.).

Architects Board Rule NCAC 21-02.0209(9)

Fee bidding on Public Projects. An architect shall not knowingly cooperate in a violation of any provisions of G.S. 143-64.31.



Board Newsletter Spring 2001

Questions & Answers

The Engineering and Surveying newsletter provided answers posed in a Consulting Engineers Council of North Carolina meeting in January 2001.

See the Board's website at www.ncbels.org under FAQ.

QBS

Board Newsletter Spring 2001 Selected Questions & Answers

Is a two envelope system acceptable under the provisions of the Mini-Brooks Act?

No. A project cost may not be provided until a firm has been selected based upon a qualification based process.

QBS

Board Newsletter Spring 2001 Selected Questions & Answers

What about the delivery of unit prices for the project?

The delivery of unit prices as a response to a request for proposal identifies relative information with respect to general fees and is not specific to tasks related to the project. The submission of any information, which can be easily correlated to a fixed price or a bid, is prohibited unless the project has been exempted.

Board Newsletter Spring 2001

Selected Questions & Answers

What is considered a fee bid?

The submission of any information that would allow the public entity to determine a total project fee would be considered a "fee bid."

Board Newsletter Spring 2001

Selected Questions & Answers

Who must issue the written exemption?

The exemption can only be issued by the entity that is authorized to award the contract.

Are special inspections of an engineering nature subject to the Act?

Yes, since the services are engineering services, the Mini-Brooks Act would apply.

NC Attorney General Advisory Opinion 1/19/01 (requested by NCBEES)

The Attorney General's Advisory Opinion determined that the selection of sub-consultants, where the contract is not with the government entity, is not subject to the Mini-Brooks Act.

Now Addressed by Mini-Brooks Act

- Construction Manager at Risk Services (in more detail)

Design/Build Approaches

- Design-Build Services
- Public-Private Partnership Construction Services (financing contracts)
- Design-Build Bridging Contracts (separate contracts for design and for construction)

Construction Manager at Risk Services

Construction Manager at Risk services were added to the Mini-Brooks Act as Session Law 2001 – 496. The language was revised by House Bill 857 that was ratified and became law effective August 23, 2013, as Session Law 2013, Chapter 401, Section 5.

Construction Manager at Risk services are defined in G.S. 143-128.1.

§ 143-128.1. Construction management at risk contracts.

(b) The construction manager at risk shall be selected in accordance with Article 3D of this Chapter. Design services for a project shall be performed by a licensed architect or engineer. The public owner shall contract directly with the architect or engineer. The public owner shall make a good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business entities when selecting a construction manager at risk.

Construction Manager at Risk Services

§ 143-128.1. **Construction management at risk contracts.**

(a) For purposes of this section and G.S. 143-64.31:

- (1) "Construction management services" means services provided by a construction manager, which may include preparation and coordination of bid packages, scheduling, cost control, value engineering, evaluation, preconstruction services, and construction administration.
- (2) "Construction management at risk services" means services provided by a person, corporation, or entity that (i) provides construction management services for a project throughout the preconstruction and construction phases, (ii) who is licensed as a general contractor, and (iii) who guarantees the cost of the project.
- (3) "Construction manager at risk" means a person, corporation, or entity that provides construction management at risk services.
- (4) "First-tier subcontractor" means a subcontractor who contracts directly with the construction manager at risk.

Construction Manager at Risk Services (cont'd)

§ 143-128.1. Construction management at risk contracts. (cont'd)

(b) The construction manager at risk shall be selected in accordance with Article 3D of this Chapter. Design services for a project shall be performed by a licensed architect or engineer. The public owner shall contract directly with the architect or engineer. The public owner shall make a good-faith effort to comply with G.S. 143-128.2, G.S. 143-128.4, and to recruit and select small business entities when selecting a construction manager at risk.

(c) The construction manager at risk shall contract directly with the public entity for all construction; shall publicly advertise as prescribed in G.S. 143-129; and shall prequalify and accept bids from first-tier subcontractors for all construction work under this section. The prequalification criteria shall be determined by the public entity and the construction manager at risk to address quality, performance, the time specified in the bids for performance of the contract, the cost of construction oversight, time for completion, capacity to perform, and other factors deemed appropriate by the public entity. [...]

Construction Manager at Risk Services (cont'd)

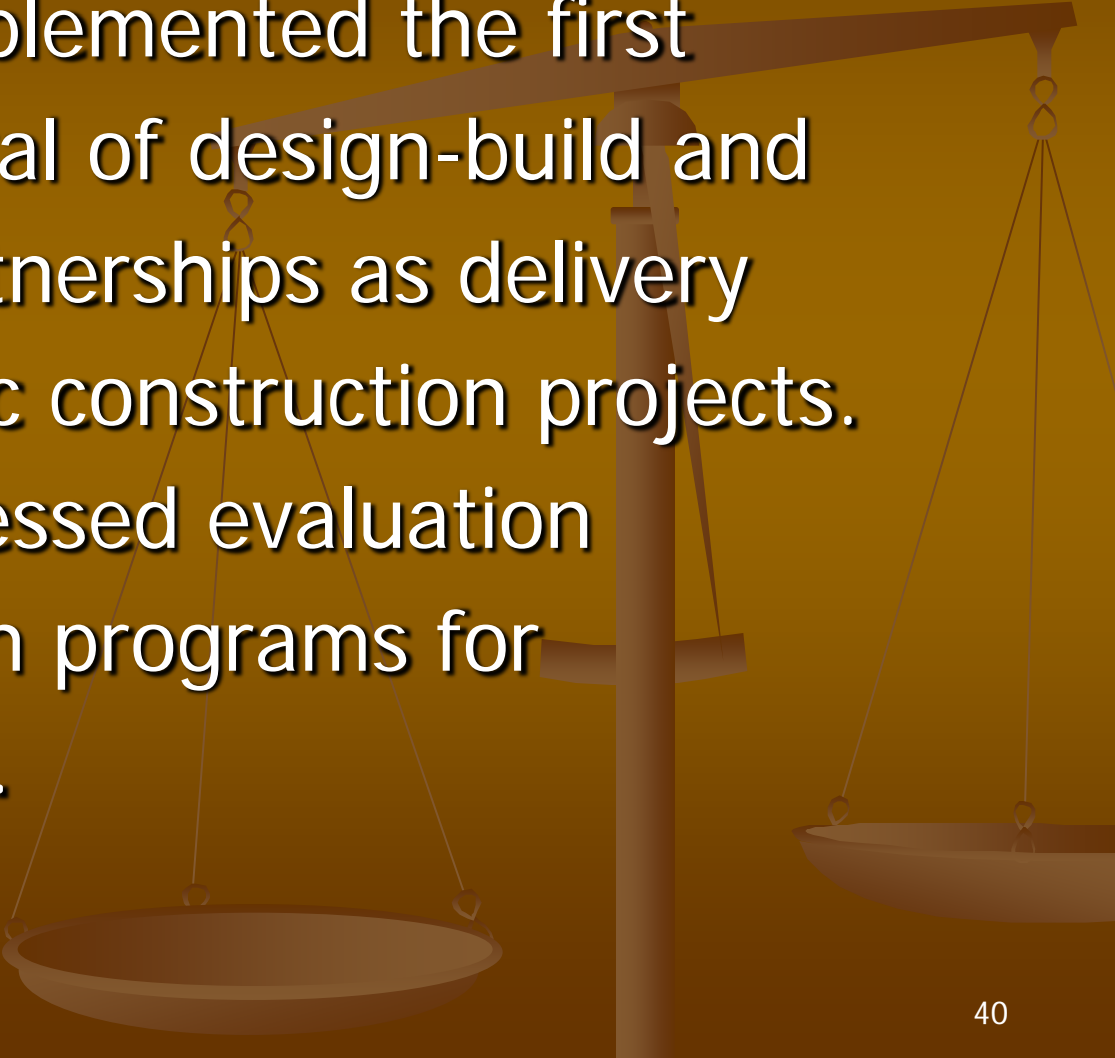
§ 143-128.1. Construction management at risk contracts. (cont'd)

(d) The construction manager at risk shall provide a performance and payment bond to the public entity in accordance with the provisions of Article 3 of Chapter 44A of the General Statutes. (2001-496, s. 2; 2013-401, s. 5.)



Application to Design/Build Approaches

House Bill 857 implemented the first state-wide approval of design-build and public-private partnerships as delivery methods for public construction projects. The bill also addressed evaluation of pre-qualification programs for public contracting.



Now Addressed by Mini-Brooks Act

Design/Build Approaches

- Design-Build Services
- Public-Private Partnership Construction Services (financing contracts)
- Design-Build Bridging Contracts (separate contracts for design and for construction)

Design-Build Services and Public-Private Partnership Financing Contracts

Design-build services and public-private partnership construction services were added to the Mini-Brooks Act by House Bill 857 that was ratified and became law effective August 23, 2013, as Session Law 2013, Chapter 401, Section 2.

Design-build services and public-private partnership construction contracts (financing contracts) are defined in G.S. 143-128.2.

Design-Build Services and Public-Private Partnership Construction Services

What must the public entity do?

How are design-build services and public-private partnership construction services defined?

Defined by House Bill 857 (Session Law 2013, Chapter 401, Section 2 by reference to GS 143-128.1A, 1B & 1C.)

What must the construction contractor do?

What are the penalties for non-compliance?

Remember NCGS 143-64.31?

(a) It is the public policy of this State and all public subdivisions and Local Governmental Units thereof, except in cases of special emergency involving the health and safety of the people or their property, to announce all requirements for architectural, engineering, surveying, construction management at risk services, [design-build services, and public-private partnership construction services]

Design Build Contracts

§ 143-128.1A. Design-build contracts.

(b) A governmental entity shall establish in writing the criteria used for determining the circumstances under which the design-build method is appropriate for a project, and such criteria shall, at a minimum, address all of the following:

(1) - (6)

(c) A governmental entity shall issue a public notice of the request for qualifications that includes, at a minimum, general information on each of the following:

(1) – (8)

§ 143-128.1A. Design-build contracts.

(d) Following evaluation of the qualifications of the design-builders, the three most highly qualified design-builders shall be ranked. If after the solicitation for design-builders not as many as three responses have been received from qualified design-builders, the governmental entity shall again solicit for design-builders. If as a result of such second solicitation not as many as three responses are received, the governmental entity may then begin negotiations with the highest-ranked design-builder under G.S. 143-64.31

Design – Build Bridging Contracts

§ 143-128.1B. Design-build bridging contracts.

(a) Definitions for purposes of this section:

- (1) Design-build bridging. - A design and construction delivery process whereby a governmental entity contracts for design criteria services under a separate agreement from the construction phase services of the design-builder.

Design–Build Bridging Contracts (cont'd)

(b) A governmental entity shall establish in writing the criteria used for determining the circumstances under which engaging a design criteria design professional is appropriate for a project, and such criteria shall, at a minimum, address all of the following:

Items (1) – (6)

(c) On or before entering into a contract for design-build services under this section, the governmental entity shall select or designate a staff design professional, or a design professional who is independent of the design-builder, to act as its design criteria design professional as its representative for the procurement process and for the duration of the design and construction.

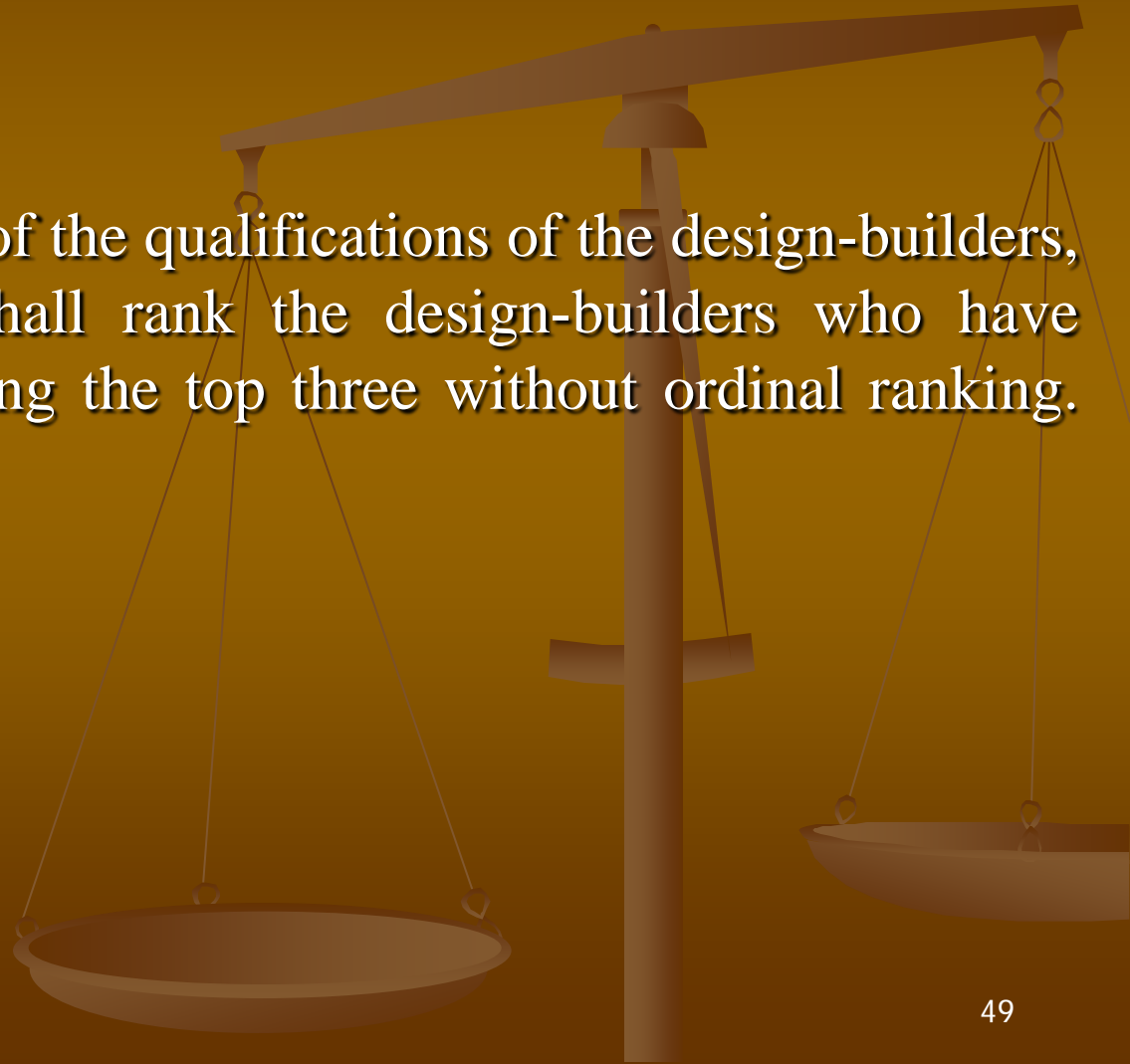
Items (1) – (9)

Design–Build Bridging Contracts (cont'd)

((d) A governmental entity shall issue a public notice of the request for proposals that includes, at a minimum, general information on each of the following:

Items (1) – (6)

(e) Following evaluation of the qualifications of the design-builders, the governmental entity shall rank the design-builders who have provided responses, grouping the top three without ordinal ranking.



Public-Private Partnership Financing Contracts

§ 143-128.1C. Public-private partnership construction contracts.

(b) If the governmental entity determines in writing that it has a critical need for a capital improvement project, the governmental entity may acquire, construct, own, lease as lessor or lessee, and operate or participate in the acquisition, construction, ownership, leasing, and operation of a public-private project, or of specific facilities within such a project, including the making of loans and grants from funds available to the governmental entity for these purposes... The governmental entity may enter into development contracts with private developers with respect to acquiring, constructing, owning, leasing, or operating a project under this section. The development contract shall specify the following:

Items (1) - (4)

Public-Private Partnership Financing Contracts

(i) Based upon the qualifications package submitted by the private developers and any other information required by the governmental entity, the governmental entity may select one or more private developers with whom to negotiate the terms and conditions of a contract to perform the public-private project. The governmental entity shall advertise the terms of the proposed contract to be entered into by the governmental entity in a newspaper having general circulation within the county in which the governmental entity is located at least 30 days prior to entering into the development contract.

So What Does It Mean?

- Analysis to apply Mini-Brooks to the different construction delivery methods
 - Construction Manager at Risk Services
 - Design-Build Services
 - Public-Private Partnership Construction Services
 - Design-Build Bridging Contracts (separate contracts for design and for construction)

Additional Materials

The full body of the Statutes that were abbreviated in this presentation are in a separate presentation for further study and application to specific Requests for Proposals that involve creative combinations with construction services.

NCGS 143-128(a1) REVIEW

(a1) Construction methods. - The State, a county, municipality, or other public body shall award contracts to erect, construct, alter, or repair buildings pursuant to any of the following methods:

- (1) Separate-prime bidding.
- (2) Single-prime bidding.
- (3) Dual bidding pursuant to subsection (d1) of this section.
- (4) Construction management at risk contracts pursuant to G.S. 143-128.1.
- (5) Alternative contracting methods authorized pursuant to G.S. 143-135.26(9).
- (6) Design-build contracts pursuant to G.S. 143-128.1A.
- (7) Design-build bridging contracts pursuant to G.S. 143-128.1B.
- (8) Public-private partnership construction contracts pursuant to G.S. 143-128.1C.

Turn for Advice

NCGS 143-64.33

On architectural, engineering, or surveying contracts, the Department of Transportation or the Department of Administration may provide, upon request by a county, city, town or other subdivision of the State, advice in the process of selecting consultants or in negotiating consultant contracts with architects, engineers, or surveyors or any or all.

Department of Administration in the statute
is a reference to the State Construction
Office.

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Department of Transportation

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Turn for Advice

- Purchasing Manager
- AG/City/County Attorney
- Institute of Government
- State Construction Office
- DOT
- Board of Examiners for Engineers and Surveyors - Board Counsel

QBS



Example of a Company's Response
to a Request for Proposal in
compliance with the Mini-Brooks Act

(Company) will not knowingly contribute in any manner to the violation of the letter or intent of NC General Statute 143-64.31, et seq.

By submitting this price proposal, (Company) has the full knowledge and belief that, and by accepting this proposal for consideration, you, as the unit of government, are affirming that:

QBS Company Response to RFP

1. This proposal is not for a contract to be awarded by the State of North Carolina or any of its agencies, by a public subdivision or by a unit of local government for architectural, engineering, land surveying, construction management at risk services, [design-build services, or public-private partnership construction services]; or
2. You have announced the requirements for professional services and solicited this proposal on the basis of having selected (Company) by qualifications based selection to accomplish this work without regard to fee other than possibly unit price information, and you are not negotiating with, or have terminated negotiations with, any other firm or company for the accomplishment of this work while this proposal is being considered⁶ for possible acceptance by you; or

3. You, as the unit of local government or NCDOT, have under G.S. 143-64.32 in writing exempted the particular project from the provisions of G.S. 143-64.31, et seq. based upon the total estimated professional fee being less than \$50,000 ~~or in your sole discretion as the unit of government stating the reasons for such exemption and the circumstances attendant thereto~~, and have furthermore provided (Company) with a copy of such statement of exemption signed or adopted by the contracting authority; or

4. The project is a State capital improvement project under the jurisdiction of the State Building Commission, a capital improvement project of The University of North Carolina, or a community college capital improvement project, where the estimated expenditure of public money is less than five hundred thousand dollars (\$500,000), and therefore exempt from the provisions of G.S. 143-64.31.

Otherwise, this proposal is null and void.

Real World Scenarios

(How do you respond?)

- RFP from State agency requesting price for engineering or surveying
- Call from utility department to do project
- Call to be one of three to submit proposal
- RFP to submit price for project
- RFP to submit man-hour rates for project
- RFP by county, all private money
- RFP by downtown redevelopment corporation
- Architect requests price for engineering or surveying on county project

Real World Scenarios (cont'd)

(How do you respond?)

- Construction contractor requests price for engineering or surveying on county project
- Request from construction contractor to:
 - be one of three to submit proposal
 - submit price for project
 - submit man-hour rates for project
 - Submit price, all private money
 - Submit price for downtown redevelopment corporation project
- Not as many as three responses have been received from qualified design-builders

Real World Scenarios

- Can you respond to “On Call” type RFP’s that included multiple projects up to a certain dollar amount, and it covered several years?
 - Initial selection will be QBS and then each project will be negotiated for a fee. It is not being done as an exemption to the Mini-Brooks Act, but rather as a way to comply with the Act.

- You are working for a number of towns on recurring contracts for engineering administrative services as their “town engineer” and they want to continue.
 - If the estimated costs for a year are more than \$50,000.00, do they announce these services annually or can they amend a previous contract to extend the contract?
 - If it is treated as having met the statutory requirements at the time of the RFP for qualifications based selection with the fee negotiation delayed until applied to specific projects, it is not using an exemption. The RFQ should be for a specific time period and a new RFQ be issued after the expiration.

- If the professional fee is less than \$50,000.00, can they exempt themselves from announcement?
 - They can exempt from all requirements of the Mini-Brooks Act, including announcement
- Can a city approve a “blanket” exemption for all projects during a fiscal year of any size up to \$50,000.00 and award to any firm they desire?
 - No. Must be done for each “particular project.”
- Can an exemption be approved by city staff or does everything go for council action?
 - It has generally been considered that whoever is authorized to approve and enter into the contract must issue the written exemption, normally the Council.

QUESTIONS ?